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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services	)	CC Docket No. 92-297
	)	
Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules	)	
	)	
Suite 12 Group Petition for Pioneer's Preference	)	PP-22

To: The Commission

MOTION FOR STAY PENDING REVIEW OF
PETITION FOR RECONSIDERATION

LDH International, Inc. ("LDH"), Celltel Communications Corporation ("Celltel"), and CT Communications Corporation ("CT") (collectively, the "Petitioners"), by their attorneys and pursuant to Section 405 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 405, and Sections 1.106(n) and 1.429(k) of the Commission's Rules, 47 C.F.R. §§ 1.106(n); 1.429(k)[1], hereby request a Stay pending review of their pending Petition for Reconsideration

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[1] Petitioners have previously explained that Section 1.429 of the Rules governs petitions for reconsideration of orders in notice and comment rule making proceedings; Section 1.106 governs petitions for reconsideration of other FCC actions. For documents in rule making proceedings, the thirty-day reconsideration period is calculated from the date that the order (or a summary thereof) is published in the Federal Register; for other documents, that period generally begins to run from the release date. See 47 C.F.R. § 1.4(b). The portion of the Second R&O for which Petitioners seek reconsideration is the denial of the petitions for reconsideration of the dismissal of their applications for 28 GHz facilities. Although the dismissal of applications would appear to be an adjudicatory action, that action was taken as part of a notice and comment rule making proceeding. Out of an abundance of caution, Petitioners filed their Petition on the deadline calculated pursuant to Sections 1.106 and 1.4(b)(2). To the extent necessary, the

("Petition") of the FCC's Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making in the above-captioned proceeding, FCC 97-82 (released March 13, 1997) (the "Second R&O"). In support hereof, the following is respectfully shown:

I. Procedural and Factual Background.

On April 14, 1997, Petitioners filed their Petition with the Commission. To date, no interested parties have filed any oppositions to that request.

Petitioners have requested that the FCC reconsider the denial of reconsideration of the dismissal of their 28 GHz microwave applications. Many of Petitioners' applications had previously attained "cut-off" status and were the subject of timely-filed competing applications or protests, some of which have been settled. The Petition explained that cut-off applicants have certain equities in their favor due to that status, that should not be summarily or arbitrarily deprived. Moreover, where petitions to deny have been filed, the Act requires something more than the summary disposition accorded Petitioners' applications.

The Petition also explained that the FCC's summary dismissal of Petitioners' applications failed to provide Petitioners with the "particular, individualized" review required in processing detailed applications and waiver requests. Petitioners' applications are supported by many of the same justifications as the single LMDS waiver application that the FCC has granted. Indeed, Petitioners' proposals were even more spectrally-efficient than the similar Hye Crest proposal, which the FCC granted. The FCC has failed to provide any reasons for not affording Petitioners' applications the same favorable treatment as that other applicant. Moreover, the FCC has not

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Petitioners will supplement that filing within the period permitted by Sections 1.429 and 1.4(b)(1).

indicated why pending applicants in other, similar services have been processed, while Petitioners and others in this proceeding were not given similar dispensation.

Finally, the Petition explained that the FCC's findings with regard to the impact of Petitioners' proposals on assigned users of the 28 GHz band were contradicted by the rulemaking record and by the filings in response to Petitioners' individual applications.

For all these reasons, Petitioners have asked that their applications be reinstated and processed for grant. In those instances where one of Petitioners' applications may be considered mutually exclusive with another qualified applicant, Petitioners have asked that the FCC resolve that mutually-exclusive situation consistent with the rules that applied when these applications were filed.

II. Good Cause Exists for Grant of a Stay

The Commission may grant a stay pending review of a petition for reconsideration following a showing of "good cause." See 47 C.F.R. §1.429(k). That standard is more flexible than the judicial standard for obtaining injunctive relief. For instance, the FCC may grant a stay pending reconsideration even where the petitioner has *not* shown any likelihood of success on the merits. See, e.g., Angeles Broadcasting Network, 59 RR2d 758 (1985) (stay granted to avoid interruption of service to the public despite agency conclusion that petition lacked merit). In other cases, the Commission has granted a stay though there was no showing of "irreparable injury", which is typically necessary to obtain a judicial injunction. See Lompoc Valley Cable TV, 1 RR2d 1081 (1964) (stay granted due to "policy questions" raised by the petitioner).

These authorities hold that the FCC need not apply any rigid "test" or "formula" to grant a stay pending review of a petition for reconsideration. Each stay request should be reviewed on

the merits, with a stay granted when there is a sufficient showing of "good cause". The Petitioners' stay request meets these FCC standards.

First of all, this stay request should be granted in the interests of sound spectrum management policy. Petitioners have substantial operational experience in the microwave communications industry, and would be prepared to construct and operate their proposed systems immediately following reinstatement and grant of their applications. Based on recent FCC auction experience, the same cannot be said for others who might bid for this microwave spectrum at auction.

Petitioners are financially, technically, and legally qualified to operate these proposed microwave systems; that is not necessarily the case for anyone who might bid on this spectrum at auction. Hence, if the FCC were to proceed to auction off this microwave spectrum prior to reviewing this Petition on the merits, it would be serving only the inchoate interests of applicants who have yet to establish their licensee credentials to this agency, and who might never construct these facilities. That makes no sense as a matter of sound spectrum allocation policy. Rather, the stay will ensure that the Petitioners, who have already established their licensee *bona fides*, and their applications will be given a full and fair review before the FCC even considers allocating this radio spectrum to unknown and unqualified entities.

A grant of this stay request will also avoid potential interruptions of service and market upheavals. It will be difficult for the FCC to avoid causing financial damages to anyone that might be interested in bidding for these microwave licenses, should this agency or a court of appeals subsequently determine that Petitioners' applications should have been granted. The relatively light demand for similar Wireless Communications Service spectrum, as shown in

those recent auctions, suggests that there is no pressing demand for commencement of these microwave auctions. Hence, the FCC ought to err on the side of caution, and avoidance of unnecessary expense, and stay these auctions pending review of Petitioners' request.

In short, "good cause" exists, under established FCC precedents, for the FCC to stay the dismissal of these microwave applications, and to stay the commencement of auctions for these particular microwave channels, pending review of the Petition. Grant of Petitioners' stay request is a "proper means of maintaining the status quo pending final action on the petitions for reconsideration." Arizona Mobile Telephone Company, 66 FCC2d 691 at ¶ 13 (1977). A stay will provide the FCC the opportunity to review the pending petitions for reconsideration, "study the ... pleadings, conduct the proper research", and craft an order that will address the legitimate interests of these applicants. Id. at ¶ 13.

III. This Stay Request Meets the Judicial Standards

If for some reason the FCC were to apply the judicial standards for obtaining injunctive relief, this stay request still meets that test and should be granted. The familiar "four-prong" test for injunctive relief in the District of Columbia and other Circuits states that a stay should be granted where: (1) interested parties are likely to prevail on the merits; (2) interested parties will be irreparably harmed should the stay be denied; (3) no harm will result to other interested parties if the stay is granted; and (4) the public interest warrants that a stay be granted. Washington Metropolitan Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). This test is a "flexible one", Population Institute v McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986); an "absolute certainty of success" is not required. Id. citing Cuomo v. U.S. Nuclear Regulatory Comm., 772 F.2d 972, 974 (D.C. Cir. 1985). Petitioners' request for stay

satisfies these judicial standards.

A. Likelihood of Success on the Merits

For reasons stated herein and in Petitioners's accompanying Petition for Reconsideration, there is a high likelihood that Petitioners would prevail on the merits. The dismissal of their microwave applications appears to be inconsistent with the FCC's own procedures and pronouncements concerning the processing of these applications. Moreover, the dismissal of those applications is contrary to recent judicial precedents that have addressed quite similar issues on appeal of FCC dismissal decisions. See, e.g., Reuters, Ltd. v. FCC, 781 F.2d 946 (D.C.Cir. 1986) (*ad hoc* departures from the published cut-off rules, "even to achieve laudable ends" cannot be sanctioned); McElroy Electronics Corporation v. FCC, 990 F.2d 1351, 1365 (D.C.Cir. 1993) ("McElroy I"); McElroy Electronics Corporation v. FCC, 86 F.3d 248, 257 (D.C.Cir. 1996) ("McElroy II") (timely filers have "an equitable interest in the enforcement of the cut-off rules" and the FCC "may not decline to enforce its deadlines so long as the rules themselves are clear and the public notice apprises potential competitors"); Florida Institute of Technology v. FCC, 952 F.2d 549, 554 (D.C.Cir. 1992) (cut-off applicants "certainly have an equitable interest [in that status] whose weight it is 'manifestly within the Commission's discretion to consider'") (citations omitted).

Presumably, the FCC may disagree with Petitioners' conclusion that there is a high likelihood of success should this matter need to be litigated. Nevertheless, in light of substantial precedents that support Petitioners' position, it simply makes great practical sense to stay the dismissal of these applications, and at least thoroughly address these legal arguments, before proceeding with auctions that might incur unnecessary resources and expense.

B. Petitioners and Others will Suffer Irreparable Harm if the Applications are Dismissed.

No one can accurately predict the extent of the damage that the FCC's dismissal decision will cause to the Petitioners if the FCC proceeds with auctions and the Petitioners' applications are subsequently reinstated and granted. Yet, that is the very definition of "irreparable injury". The injury may be great, or it may be small; but, it is simply incalculable at this point. Moreover, it is certain that no subsequent actions by this agency will suffice to make the Petitioners "whole" again, or to return their businesses to the *status quo ante*, should the FCC auction-off the spectrum that is designated in their applications.

That is why a stay of this dismissal decision is eminently appropriate. As the leading cases state, where the potential damages are "incalculable", injunctive relief is appropriate. See, e.g., Federal Leasing v. Underwriters at Lloyd's, 650 F.2d 495, 499 (4th Cir. 1981); Blackwelder Furniture Co. v. Selig Manufacturing Co., 550 F.2d 189, 196 (4th Cir. 1977); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970); Perpetual Building Limited Partnership v. District of Columbia, 618 F.Supp. 603 (D.D.C. 1985).

C. No Harm to Other Interested Parties.

No one will be harmed if the FCC enjoins its dismissal action, and even if it ultimately grants those applications. Potential bidders must have anticipated that these pending applications, including potential "MX" applications, were likely to be processed under the FCC's existing rules prior to auctions for any unlicensed microwave spectrum. That was certainly how the FCC processed pending MDS applications, prior to auctions for that similar spectrum. Moreover, with an application "freeze" in place for this microwave spectrum, a stay makes no difference to third parties who could not file for these particular transmitter sites in any event. A

stay will merely maintain the *status quo ante* while the Commission considers the legal and equitable arguments for grant of Petitioners' applications.

D. A Stay Will be in the Public's Interest.

The overriding purpose of a stay is to protect the public interest from injury or destruction while remedies are being pursued. The Evening Star Broadcasting Company et al., 68 FCC 2d 158,163 (1978). Surely the LMDS investment community, its legitimate operators, and their potential customers, will benefit from a stay. In the absence of a stay, these interested individuals might needlessly expend time, money and valuable resources pursuing microwave spectrum that will ultimately be granted to Petitioners. And, since the Petitioners are more qualified today than virtually anyone else to provide these services, service to the public will not be delayed by a grant of this stay pending review of the Petition. On balance, the public interest will be served, and it simply makes good common sense, by staying the dismissal of these applications pending review of Petitioners's request and any other petitions for reconsideration.

Conclusion

For all the foregoing reasons, Petitioners respectfully request that the FCC stay the scheduling of auctions and the dismissal of Petitioners' microwave applications, pending review of Petitioners' Petition for Reconsideration of the Reconsideration Order.

Respectfully submitted,

LDH INTERNATIONAL, INC.
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Date: May 15, 1997

CERTIFICATE OF SERVICE

I, Regina Wingfield, a legal secretary in the law firm of Joyce & Jacobs, Attys. at Law, LLP, do hereby certify that on this 15th day of May, 1997, copies of the foregoing Motion for Stay Pending Review of Petition for Reconsideration were mailed, postage prepaid, to the following:

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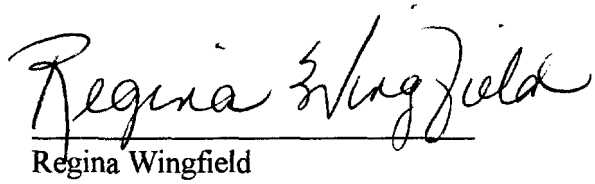

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